

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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May 28 2024

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

SC Court of Appeals

Case No. 2022-CP-43-01006
Case No. 2023-CP-36-00276
Case No. 2023-CP-36-00300
Appellate Case No. 2024-000742

Jerry Cozby, Plaintiff,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc., Defendants,

of which Kent Huntley Oliver and Thompson Construction Group, Inc., are Respondents.

AND

Dean Alan Arender and Tamala Arender, Appellants,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc., Defendants,

of which Kent Huntley Oliver and Thompson Construction Group, Inc. are Respondents.

AND

Kent Huntley Oliver, Respondent,

vs.

Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Defendants,

of which Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., are Appellants.

MOTION TO DISMISS BY RESPONDENTS

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondents Kent Huntley Oliver and Thompson Construction Group, Inc., by and through the undersigned counsel, hereby move to dismiss the appeals filed by Appellants Dean Alan Arender, Tamala Arender, US XPRESS, Inc., and US XPRESS Leasing, Inc.

BACKGROUND

This litigation arises from a multi-vehicle accident that occurred on Interstate 26 near Jalapa, South Carolina on November 12, 2020. Four individuals were involved in the accident: (1) Jerry Cozby; (2) Curtis Ouellette, driving for Quality Haulers, Inc.; (3) Kent Huntley Oliver, driving for Thompson Construction Group, Inc.; and (4) Dean Arender, driving for US XPRESS, Inc. and/or US XPRESS Leasing, Inc. Following the accident, the following lawsuits were filed:

- *Cozby v. Oliver, et al.* (“Cozby Action”)
 - C/A No. 2022-CP-43-01006
 - Plaintiff: Jerry Cozby
 - Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; and Quality Haulers, Inc.
 - Venue: Sumter County Court of Common Pleas

- *Arender v. Oliver, et al.* (“Arender Action”)
 - C/A No. 2023-CP-36-00276
 - Plaintiffs: Dean Arender and Tamala Arender
 - Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; Quality Haulers, Inc.; and DMX Transportation Services Inc.
 - Venue: Newberry County Court of Common Pleas

- *Oliver v. Ouellette, et al.* (“Oliver Action”)
 - C/A No. 2023-CP-36-00300
 - Plaintiff: Kent Huntley Oliver
 - Defendants: Curtis Kent Ouellette; Quality Haulers, Inc.; Dean Arender; U.S. XPRESS Leasing, Inc.; and U.S. XPRESS, Inc.
 - Venue: Newberry County Court of Common Pleas

In August 2023, Respondents filed motions under Rules 20(a) and 42(a), SCRCP, to join and consolidate the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial under Case No. 2022-CP-43-01006, the case number assigned to the Cozby Action. The

circuit court held a duly noticed hearing on Respondents' motions on October 9, 2023, and heard argument from counsel for all parties in the effected cases.

On February 13, 2024, the circuit court granted Respondents' motions. Pursuant to Rule 20(a), SCRCPP, the circuit court joined the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial in Sumter County under the civil action number assigned to the Cozby Action. In its Order, the circuit court made three primary findings: (i) the requirements for permissive joinder under Rule 20(a) are satisfied, (ii) venue over the joined cases is proper in Sumter County, and (iii) joinder of the actions is desirable for the parties and the court. *See* February 13, 2024 Order ("Order") at 5-12.

Following the circuit court's Order, Appellants filed motions for reconsideration under Rule 59(e), SCRCPP. The circuit court denied Appellants' motions by Orders dated April 4, 2024.

On May 3, 2024, Appellants filed notices of appeal from the circuit court's February 13 and April 4 Orders.¹ On May 16, 2024, this Court issued correspondence to the parties advising that the notices of appeal were consolidated under Appellate Case No. 2024-000742. This motion to dismiss follows.

ARGUMENT

I. Legal Standard

"The determination of whether a trial court's order is immediately appealable is governed by statute." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Section 14-3-330 of the South Carolina Code embodies the final judgment rule: "[a]n appeal ordinarily may be pursued only after a party has obtained a final judgment."

¹ Appellants Dean Arender and Tamala Arender joined in one notice of appeal, and Appellants US XPRESS, Inc., US XPRESS Leasing, Inc., and Dean Arender joined in a separate notice of appeal.

Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). However, section 14-3-330 also provides appellate courts with jurisdiction to review certain categories of intermediate—or interlocutory—orders. *See EnerSys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 617, 738 S.E.2d 478, 479 (2013) (noting “an order must fall within one of the enumerated subsections [of 14-3-330] to be immediately appealable”). Two such categories of intermediate orders that are immediately appealable are orders “involving the merits” under section -330(1) and orders “affecting a substantial right” under section -330(2).

II. The Order on Appeal is Not a Final Order.

For purposes of determining appealability, a final order is one that “constitutes an ultimate decision on the merits.” *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 278, 678 S.E.2d 825, 829 (Ct. App. 2009) (citation omitted). “An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006)). Put simply, “an order is not immediately appealable when appellants have not arrived at the end of the road and would be able to appeal the decision after the trial was finished.” *Id.* at 459, 756 S.E.2d at 163 (citation omitted) (cleaned up).

The Order before the Court in this appeal is not a final order. Rather than conclusively determining the parties' rights, the Order simply joins the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial in Sumter County. Plainly, there are more acts the circuit court must undertake before “the end of the road” and final judgment. Therefore, immediate review can only lie if the Order on appeal falls into one of the categories set forth in section 14-3-330. As Respondents will now explain, that analysis leads to dismissal of this appeal.

III. The Order on Appeal is Not Appealable under any Provision of 14-3-330.

The provisions of section 14-3-330 allowing for immediate review of certain interlocutory orders are “narrowly construed” to protect the basic policy against piecemeal litigation. *Watson*, 407 S.C. at 458, 756 S.E.2d at 163. Respondents expect Appellants to argue the Order involves the “mode of trial” and is therefore immediately appealable under section 14-3-330(2). The Court should reject any such argument and recognize appellate review is not permitted at this stage.

South Carolina’s appellate courts have previously recognized that orders involving the mode of trial affect substantial rights under section 14-3-330(2) and are immediately appealable. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (collecting cases). However, analysis of cases discussing mode of trial orders reveals that this exception applies in limited circumstances where the order at issue truly impacts a substantial right that could determine the action. An order denying a request for a jury trial, for example, involves the mode of trial and is immediately appealable. *Id.*; *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Similarly, the South Carolina Supreme Court has determined an order granting a motion to disqualify a party’s attorney affects a substantial right and may be immediately appealed. *State v. Wilson*, 387 S.C. 597, 602, 693 S.E.2d 923, 925 (2010). Notably, the *Wilson* Court reached this conclusion after recognizing that such an order “in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case.” *Id.*

Here, the Order on appeal affects no such substantial right. As noted above, the Order simply joins the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial in Sumter County. The Order has no impact on Appellants’ right to a jury trial or their counsel of

choosing. Instead, the Order merely selects the forum for trial and dictates that the trial will take place in a single proceeding.

As such, the Order on appeal resembles other orders South Carolina’s appellate courts have held do *not* involve the mode of trial or affect substantial rights. Two classes of orders bear discussion—those granting or denying a motion for change of venue and those bifurcating trial. The Supreme Court considered whether an order denying a change of venue is immediately appealable in *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). There, the defendants were sued in Hampton County and argued for a change of venue to Lexington County. After the trial court refused to transfer venue, the defendants sought immediate appellate review, arguing the trial court’s order “affected their substantial right to venue in the county of their residence and . . . effectively struck out a portion of their answer.” *Id.* at 92, 529 S.E.2d at 13.

The Supreme Court rejected defendants’ arguments, noting “[i]mmediate appeals under subsection [330(2)] have been allowed in situations where the substantial right could not be vindicated on appeal after the case.” *Id.* at 93, 529 S.E.2d at 13. The Court recognized that the only risk associated with prohibiting defendants’ immediate appeal would be “the expense of litigating in an improper county.” *Id.* at 94, 529 S.E.2d at 14. Accordingly, the Court held the venue order did not affect the mode of trial: “since any venue error will be correctable upon appeal after trial, we find the right of proper venue has not been affected such that the order would be immediately appealable.” *Id.* at 94-95, 529 S.E.2d at 14.

Applying a similar analysis, the Supreme Court has also held an order granting bifurcation of issues at trial is not immediately appealable as an order affecting the mode of trial. *Flagstar*, 341 S.C. 68, 533 S.E.2d 331. In *Flagstar*, a declaratory judgment action, the trial court granted the plaintiff’s motion for bifurcation of trial into two distinct phases. The defendant argued the

order was immediately appealable under section 14-3-330(2), claiming “bifurcation of the issues deprived it of that mode of trial to which it is entitled as a matter of right.” *Id.* at 72, 533 S.E.2d at 333. The Supreme Court disagreed, noting “[the mode of trial] analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case.” *Id.* The Court found the defendant was not denied the right to a trial by jury and further noted that, after trial, the defendant would “be free to advance on appeal that the trial judge abused his discretion in ordering bifurcation and that it has thereby been effectively deprived of a fair and/or fully informed fact finder.” *Id.* Importantly, the Court concluded, “trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right.” *Id.* at 73, 533 S.E.2d at 333.

The foregoing decisions compel dismissal of this appeal. To the extent Appellants contend the circuit court’s Order is appealable because it (i) transfers venue of the Arender Action and the Oliver Action to Sumter County or (ii) requires that the cases be tried in a single proceeding, these arguments miss the mark. Under *Breland* and *Flagstar*, orders changing venue or directing that trial proceed in a particular manner are not immediately appealable.² Crucially, Appellants will be able to seek appellate review of the circuit court’s Order after trial and full development of the evidence. The Court should not permit Appellants to delay litigation further by engaging in piecemeal litigation.

² To the extent Appellants make other arguments in favor of immediate appealability, Respondents would note that orders granting motions for intervention are likewise unappealable. *Duncan v. Gov’t Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994). Respondents will address any additional arguments in their reply memorandum. *See* Rule 240(f), SCACR.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court dismiss the notices of appeal filed by Appellants.

Respectfully submitted,

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